TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 57.

THE BROOKLYN LIFE INSURANCE COMPANY OF NEW YORK, APPELLANT,

vs.

CLINTON O. DUTCHER AND ANNIE C. DUTCHER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED MARCH 17, 1875.

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INDEX.

	Original.	Print.
Petition	1	1
Summons	3	2
Sheriff's return on summons	4	2
Petition for removal	5	3
Bond	5	3
Policy of insurance	7	4
Appearance entered and answer filed	10	6
Time for taking testimony extended	12	7
Agreed statement of facts filed	13	8
Agreed statement of facts	13	8
Receipt for premium	16	9
Case argued and submitted	18	10
Judgment	18	11
Defendant ordered to pay costs	19	11
Appeal prayed for and allowed	19	11
Bond of appeal fixed at $1,000	20	11
Bond of appeal filed and approved	20	12
Bond of appeal	20	12
Opinion of the court	23	12
Clerk's certificate	35	18

1 UNITED STATES OF AMERICA,
Eastern District of Missouri, sct.

In the circuit court of the United States in and for said district.

CLINTON O. DUTCHER AND ANNIE C. DUTCHER, his wife, plaintiffs,
vs.
THE BROOKLYN LIFE-INSURANCE CO., Defendant.
} Removed from the circuit court of S't Louis County.

Be it remembered that on the seventh day of September, A. D. eighteen hundred and seventy-two, there was filed in the clerk's office of the circuit court of the United States in and for said eastern district a transcript of the record and proceedings in the above entitled case had before the circuit court of Saint Louis County; which said transcript is in the words and figures following, to wit:

STATE OF MISSOURI, COUNTY OF S'T LOUIS, *ss:*

Be it remembered that on the first day of March, A. D. eighteen hundred and seventy-two, there was filed in the office of the clerk of the circuit court of S't Louis County a petition, which petition is in words and figures, namely:

Petition.

Circuit court of S't Louis County. June term, 1872.

CLINTON O. DUTCHER AND ANNIE C. DUTCHER, his wife, pl'ffs,
vs.
THE BROOKLYN LIFE-INSURANCE CO'Y, D'F'TS.

2 Plaintiffs state that they are husband and wife, and that the defendants were at the times hereinafter mentioned and are now a corporation duly created and organized under and pursuant to the acts of the legislature of the State of New York, and doing business in this State pursuant to the laws of this State.

That on the 29th day of February, 1868, in consideration of the payment in hand by Annie C. Dutcher, plaintiff, then wife of Clinton O. Dutcher, plaintiff, to the defendant', of the premium of six hundred and fifteen $\frac{40}{100}$ dollars on said day, and the payment by said plaintiff Annie C. Dutcher to defendants of the like premium annually on or before the 29th day of February, 1868, in each and every year until ten full years' premiums shall have been paid, the defendants, by their agents duly authorized thereunto, made their policy of insurance in writing, herewith filed and marked "Exhibit A," and thereby insured the life of Clinton O. Dutcher, plaintiff, in the sum of ten thousand dollars, for the use and benefit of Annie C. Dutcher, plaintiff, her heirs, executors, or assigns; and thereby agreed and contracted with Annie C. Dutcher, plaintiff, among other things, that should she wish to discontinue said policy after the payment to defendants of two or more annual premiums thereon, (notice to the company of such wish being given before the net premium becomes due,) the defendants would issue to her, the said plaintiff, a paid-up policy for as many tenths of the amount originally as-

sured as there shall have been annual premiums paid by plaintiffs to defendant.

That Annie C. Dutcher, plaintiff, duly paid to defendants the annual premium of six hundred and fifteen $\frac{40}{100}$ due upon said policy of insurance upon the 29th day of February, 1868, also the like premium
3 due upon said policy on the 29th day of February, 1869, and the like premium due upon said policy on the 29th day of February, 1870; also the like premium due upon said policy on the 29th day of Feb-, ruary, 1871; and in or about the month of February, 1872, to wit, on the 1st day of February, 1872, plaintiffs notified defendants that they desired to discontinue said policy, and then demanded of defendants that they would issue to plaintiff, Annie C. Dutcher, pursuant to said policy, a paid-up policy upon the life of Clinton O. Dutcher, plaintiff, for as many tenths of the sum of ten thousand dollars (the amount of said policy) as plaintiffs had paid defendants annual premiums in cash on *on* said policy, namely, a paid-up policy for four-tenths of ten thousand dollars, amounting to a paid-up policy for the sum of four thousand dollars. That although the plaintiffs, and each of them, have duly *duly* fulfilled all the conditions of said insurance on their part, defendants have refused and do still refuse to make out and deliver to Annie C. Dutcher, plaintiff, said paid-up policy of insurance on the life of Clinton O. Dutcher, plaintiff, for said sum of four thousand dollars, or any sum. Wherefore plaintiffs demand judgement, that the defendants execute and deliver to the plaintiff, Annie C. Dutcher, a paid-up policy of insurance upon the life of her said husband for four thousand dollars and for costs.

KRUM & PATRICK,
Att'ys for Pl'ffs.

Upon which petition a summons was issued to the sheriff of S't Louis County in words and figures following, namely:

Summons.

COUNTY OF S'T LOUIS, *ss:*

The State of Missouri to the sheriff of S't Louis County, greeting:

4 We command you to summon the Brooklyn Life-Insurance Comp'y to appear before the judges of our circuit court on the first day of the next term thereof, to be held in the city of S't Louis, within and for the county of S't Louis, on the first Monday of June next, then and there to answer the complaint of Clinton O. Dutcher and Annie C. Dutcher, his wife, as set forth in the annexed petition. And have you then and there this writ.

Witness, John Lewis, clerk of our said court, with the seal thereof hereto affixed at office in the city of S't Louis, this first day of May, in the year of our Lord eighteen hundred and seventy-two.

[SEAL.] JNO. LEWIS, *Clerk.*

Upon which summons the sheriff made a return in words and figures, namely:

Sheriff's return on summons.

Executed this writ in S't Louis County on the 8th day of May, 1872

by delivering a copy of the writ and petition, as furnished by the clerk, to John H. Taylor, agent for the Brooklyn Life-Insurance Company.

P. C. TAYLOR,
Sheriff,
By L. HOLY, *Deputy*.

And afterwards, at the June term, A. D. 1872, of said court, the following proceedings were had in this case, namely:

TUESDAY, *June 4th*, 1872.

CLINTON O. DUTCHER & ANNIE C. DUTCHER, his wife,
vs.
THE BROOKLYN LIFE-INSURANCE COMPANY. } 22258.

On application of defendant, by attorney, for the removal of this cause to the circuit court of the United States for the districts of Missouri, this day filed, and on the filing of a bond in the sum of one hun-
5 dred dollars, which is approved by the court, it is ordered by the court that the clerk of this court forthwith certify to the circuit court of the United States for the districts of Missouri a full and complete transcript of the record and proceedings in this cause.

Which petition for removal and bond are in the words and figures following, namely:

Petition for removal.

In the S't Louis circuit court.

CLINTON O. DUTCHER & ANNIE C. DUTCHER, his wife,
vs.
THE BROOKLYN LIFE-INS. CO., D'F'T.

Defendant in the above-entitled cause states that it is a corporation duly incorporated by the laws of the State New York and a citizen of New York; that the above-named plaintiffs are citizens of the State of Missouri, and that the amount in controversy between the parties in the above-entitled cause exceeds the sum of five hundred dollars, exclusive of costs; wherefore this defendant prays that said cause may be removed to the circuit court of the United States for the districts of Missouri, to be begun and holden at S't Louis on the first Monday of October, A. D. 1872; and to that end offers to give such security as this court may require, conditioned for its entering in the said United States circuit court, on the first day of its next term, copies of all process against it in this court, and for its appearance to said action on the first day of the next session of said United States circuit court.

SHARP & BROADHEAD,
Att'ys for Def't.

Bond.

CLINTON O. DUTCHER & WIFE, PL'FF',
vs.
THE BROOKLYN LIFE-INSURANCE COMPANY, def't.

6 Know all men by these presents that we, The Brooklyn Life-

Ins. Co., as principal, and W'm E. Harvey, as security, are held and firmly bound unto the above-named plaintiffs in the sum of one hundred dollars, well and truly to be paid, upon this condition, nevertheless: that, whereas the said defendant has applied to the circuit court of the county of S't Louis for the removal of the above-entitled cause to the United States circuit court for the districts of Missouri, now, if the said defendant shall, on or before the first Monday of October, A. D. 1872, being the first day of the next session of the said United States circuit court, enter in said last-named court copies of all process in said cause in said S't Louis circuit court, and shall, on said first Monday of October, A. D. 1872, enter its appearance in said United States circuit court to said suit, then this bond to be void; otherwise to remain in full force and virtue.

BROOKLYN LIFE-IN. CO.,
By J. H. TAYLOR,
Special Agent.
W'M E. HARVEY.

Approved in open court June 4th, '72. J. Lewis, cl'k.

STATE OF MISSOURI, *County of S't Louis, ss:*

I, John Lewis, clerk of the circuit court of S't Louis County, within and for the county aforesaid, do hereby certify that within and foregoing contains a full and complete transcript of the record and proceedings in the above-entitled cause, as fully as the same remain of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court.

JOHN LEWIS, *Clerk.* [SEAL.]

7 And said policy of insurance, filed with said transcript, is in the words and figures following, to wit:

Policy of insurance.

Non-forfeiture policy: No policy fee.

THE BROOKLYN LIFE-INSURANCE COMPANY, MONTAGUE ST., BROOKLYN. NEW YORK, 141 BROADWAY.

No. 3718. Amount, $10,000. Premium, $615.40. Age, 40.

By this policy of assurance, in consideration of the representations and agreements contained in the application therefor, and of the sum of six hundred and fifteen dollars and forty cents, to them in hand paid by Annie C. Dutcher, wife of Clinton O. Dutcher, and of the annual premium of six hundred and fifteen dollars and forty cents, to be paid on or before the twenty-ninth day of February, in each and every year, until ten full years' premium shall have been paid, do assure the life of Clinton O. Dutcher, of S't Louis, in the county of S't Louis, State of Missouri, in the amount of ten thousand dollars for the term of his natural life, with participation in profits. And the said Brooklyn Life-Insurance Company do hereby promise and agree to and with the said Annie C. Dutcher well and truly to pay or cause to be paid the said sum assured to her, or, in case she shall die before the said Clinton O. Dutcher, to pay the said sum assured to her heirs, executors, administrators, or assigns within sixty days after due notice and proof of the

death of the said person whose life is hereby insured, the balance of the year's premium, if any, and all indebtedness due or to become due to the company to be first deducted therefrom; provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is granted by this company and accepted by the said
8 Annie C. Dutcher upon these express conditions, that if the statements, declaration, and agreement made by or for the said assured contained in the application bearing date the twenty-fourth day of February, 1868, upon the faith of which this policy is made, or any part thereof, shall be found untrue in any respect, or in case the said Annie C. Dutcher shall not pay or cause to be paid the premium as aforesaid on or before the day herein mentioned for the payment thereof, or any note or notes which may be given to and received by said company in part payment of any premium, on the day or days when the same shall become due; or in case the said person whose life is insured by this policy shall, without the written consent of this company previously obtained, enter upon an aerial voyage, or shall engage as mariner, engineer, fireman, laborer, or servant in any capacity, in service on any sea, sound, inlet, river, lake, or railroad, or in the manufacture of gunpowder, fire-works, or other explosive materials, or in submarine operations or mining, or shall enter upon or engage in any military or naval service whatsoever, (the militia not in actual service excepted;) or in case he shall die by his own hand, or by the hands of justice, or in consequence of a duel, or of the violation of any law of the United States or of any State or country, then and in every such case the said company shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease and be null, void, and of no effect. And it is further understood and agreed by and between the parties hereto that the dividend of profits which may become payable by virtue of this policy to the holder thereof shall be applied
9 towards the payment of the note taken for part premiums aforesaid, and that, if this policy shall cease or become null or void, the said Annie C. Dutcher, her heirs, executors, administrators, or assigns shall be liable to pay to said company the amount of all notes taken for premium which shall remain unpaid, except the balance remaining unpaid on the note taken for part premiums and made payable at twelve months from date; and that the said last-mentioned note is to be canceled by the said company on the surrender and cancellation of the said policy; and also that this policy shall not be assigned without the consent of the said company in writing previously obtained. And it is also further understood and mutually agreed that, in case the said person whose life is hereby insured shall be or shall become in any sense an inebriate, the company shall have the right to declare this policy canceled, and shall be absolved from all liability under it on paying to the holder thereof or tendering in payment the amount of all unearned premiums actually received thereon up to the time of such payment or tender of payment. After two annual payments, should the party wish to discontinue, (notice to the company being given before the next premium becomes due,) the company will issue a paid-up policy for as many tenths of the amount originally assured as there have been annual premiums paid in cash.

In witness whereof the Brooklyn Life-Insurance Company have by their president and secretary signed and delivered this contract at the

city of New York, in the State of New York, this twenty-ninth day of February, one thousand eight hundred and sixty-eight.

[SEAL.] C. W. BOUCK,
President.
W. M. COLE,
Secretary.

[$1.00 stamp.]

10 Agents of this company are not authorized or permitted to waive, alter, or change any of the provisions of this policy.

And afterwards, to wit, at a regular stated term of the said circuit court in and for said district, begun and holden at the city of S't Louis, in said district, on Monday, the 16th day of September, A. D. 1872, the following proceedings were had in said case on said last-mentioned *to* day, to wit:

Appearance entered and answer filed.

CLINTON O. DUTCHER ET AL., PLAINTIFF,
vs.
THE BROOKLYN LIFE-INSURANCE CO., DEFENDANT. } No. 37. Removed from Saint Louis circuit court.

This day comes the defendant by its attorneys, Mess'rs Sharp and Broadhead, and enters its appearance and files its answer to the petition of the plaintiffs herein.

Which said answer, so filed as aforesaid, is in the words and figures following, to wit:

Answer.

UNITED STATES CIRCUIT COURT,
Eastern District of Missouri:

CLINTON O. DUTCHER, PL'FF,
vs.
THE BROOKLYN LIFE-INSURANCE CO., DEF'T. } In chancery.

The respondents in the above-entitled cause, saving and reserving to themselves all manner of benefit of exceptions to errors and uncertainties in the complainant's bill of complaint contained, for answer thereto, or to so much thereof as they are informed and advised is material to be answered, answering, say that it is true that on the 29th day of February, 1869, they, the said defendants, in consideration of the payment in hand of the premium of $615.40 on said day by Annie C. Dutcher
11 to defendant, and of the payment of the like premium annually on or before the 29th day of February in each and every year during the period of ten years, they insured the life of Clinton O. Dutcher for the amount and sum of ten thousand dollars, for the use and benefit of said Annie C. Dutcher, as averred, and it is true that, by the terms of said policy, defendants further agreed and contracted with Annie C. Dutcher that, should she wish to discontinue said policy after the payment by plaintiffs to defendants of two or more annual premiums thereon, (notice to the company of such wish being given before the next premium becomes due,) the defendants would issue to her a paid-up

policy for as many tenths of the amount originally assured as there shall have been annual premiums paid by the plaintiffs to defendants in cash. But these defendants say it is not true that Annie C. Dutcher duly paid to defendants the annual premium of $615.40 due on said policy on the 29th day of February, 1868, or the like premium due upon said policy on the 29th day of February, 1869, or the like premium due upon said policy on the 29th day of February, 1870, or the like premiun due upon said policy on the 29th of February, 1871, and so these defendants say they are not bound to issue to the said Annie C. Dutcher a paid-up policy for four thousand dollars nor for any other amount. Defendants say that they have offered to issue to said Annie C. Dutcher a paid-up policy for four thousand dollars upon the payment of said premium in cash up to the 29th day of February, 1871, but plaintiffs refused to pay the same nor have they or either of them paid up for any one year the amount of said annual premiums in cash, but have paid part in
12 cash and given their notes for the balance, which yet remain unpaid, with the interest thereon, nor have the said plaintiffs or either of them ever offered to deliver up the original policy in this case mentioned.

And now, having fully answered, they ask to be hence dismissed with their costs.

SHARP & BROADHEAD,
Sol. for Resp'ts.

UNITED STATES OF AMERICA,
Eastern District of Missouri, set:

John H. Taylor, being duly sworn, on his oath states that he is agent for the defendants and familiar with the business referred to in the foregoing answer. That said answer and the matters & things therein contained, so far as they are stated on the knowledge of defendants, are true, and so far as they are stated on the information of others he believes them to be true.

J. H. TAYLOR.

Subscribed and sworn to before me this 16' day of September, A. D. 1872.

H. C. GEISBERG,
Com'r U. S. Cir. Court, M'o Dist's.

And afterwards, to wit, at a regular stated term of said circuit court, begun and holden at the city of S't Louis, in said district, on Monday, the 17th day of March, A. D. 1873, the following further proceedings were had in said case on Thursday, the 24th day of April, in said year, to wit:

Time for taking testimony extended.

CLINTON O. DUTCHER ET AL., PLAINTIFFS, *vs.* THE BROOKLYN LIFE-INSURANCE CO., DEFENDANT.	Equity. Removed from circuit court of S't Louis County.

Ordered, that the time for taking testimony herein be extended in favor of both parties until the next term of this court, until which time this cause is now ordered to be continued.

13 And afterwards, to wit, at a regular stated term of said circuit

court for said district, begun and holden at the city of S't Louis, in said district, on Monday, the 16th day of March, A. D. 1874, the following further proceedings were had in said cause, on Saturday, the 21st day of March, in said year, to wit:

Agreed statement of facts—Agreed statement of facts.

CLINTON O. DUTCHER ET AL., PLAINTIFFS,
vs.
BROOKLYN LIFE-INSURANCE CO. DE FENDANT. } 37. In chancery.

This day come the parties, by their respective solicitors, and file a statement of the facts as agreed upon in this cause.

Which said statement, so filed as aforesaid, is in the words and figures following, to wit:

Agreed statement of facts.

The circuit court of the United States for the east. dist. of Missouri.

ANNIE C. DUTCHER AND CLINTON O. DUTCHER, her husband,
vs.
THE BROOKLYN LIFE-INSURANCE COMPANY. } Eastern district of Missouri.

That plaintiffs are husband and wife. That defendant is a corporation created pursuant to the laws of the State of New York, and doing business as a life-assurance company in the State of Missouri, pursuant to the laws of said State. That on the 29th day of February, 1868, the defendant, by its president and secretary, issued to the plaintiff, Annie C. Dutcher, a policy insuring the life of her husband in the sum of $10,000.00, at a yearly premium to be paid by her therefor of $615.40, said policy being in the words and figures following, to wit:

(See page No. 7 of this transcript.)

That the plaintiff, Annie C. Dutcher, and the defendant contracted and agreed together that the annual premium, $615 40,
14 due upon said policy, should be payable each year as follows: $369.24 in money and $246.16 in her promissory note, payable 12 months after date, with interest thereon at the rate of 7 per centum; that upon the payment of said sum of money and the delivery of the said note the defendant would execute and deliver to plaintiff, Annie C. Dutcher, a receipt for $615.40, the premium upon said policy for 12 months, the amount of said note to be a permanent loan from the defendant to Annie C. Dutcher, plaintiff, bearing interest at the rate of seven per centum until paid by dividends, and that at the maturity of said note a new note, bearing the same interest and covering the amount of said first-mentioned note, except as reduced by dividends and the amount of $246.40 of premium for the current year, should be given, and so on from year to year.

That said Annie C. Dutcher, plaintiff, did, on the 29th February, 1868, pay to defendant $369.24 in money and $246.16 in her promissory note, payable 12 months after date and bearing interest at the rate of seven per centum, and in return therefor defendant did deliver to said plaintiff a receipt for $615.40, the premium due Feb. 28th, 1868, on policy

3718, insuring $10,000 *dollars* for 12 months ending February 28th, 1869; that said Annie C. Dutcher did, on the 29th day of Feb., 1869, pay to defendant the like sum of money and the like note increased to the extent of the amount of the preceding note unpaid by dividend, and in return therefor defendant did deliver to said plaintiff a receipt for $615.40, the premium due Feb. 28th, 1869, on policy 3718, insuring $10,000 *dollars* for 12 months ending Feb. 28th, 1870; that the
15 said Annie C. Dutcher, plaintiff, did pay to defendant the like sum of money and the like note to that last above mentioned on the 29th day of February, 1870, and also on the 29th day of Feb., 1871, for the years then next ensuing, and defendant in return therefor did deliver at each of said dates to said plaintiff a like receipt to the above; that the delivery of said like sum of money and said like note upon the 28th February, 1871, continued said policy 3718 in force until the 29th day of February, 1872. Said receipts were in the form and to the same tenor and effect as the receipt hereto annexed and marked "A," and hereby made a part of these agreed facts.

That on the 1st day of February, 1872, there was due and owing to defendant by said Annie C. Dutcher, on account of the notes hereinbefore mentioned to have been given by said Annie C. Dutcher to defendant, the sum of $793.64.

That on the 1st day of Feb., 1872, the said Annie C. Dutcher notified defendant that she wished to discontinue policy 3718, and desired a paid-up policy therefor, and offered to deliver up to defendant said policy 3718; that defendant refused to accept said policy and to deliver to Annie C. Dutcher, plaintiff, a paid-up policy, as requested, because the said Annie C. Dutcher refused first to pay defendant said amount of $793.64, which was then and there a lien against policy 3718.

That from the time defendant began business to the 20th Jan., 1871, it was the course of business of defendant to issue paid-up policies to policy-holders on demand, without deducting the loans of the defendant to the policy-holder, and to hold the same as a lien against the
16 paid-up policy, but that on and after said date defendant refused to give a paid-up policy to any policy-holder without the payment first of any loans due defendant by such policy-holder.

Under this state of facts, is the plaintiff entitled to any relief in the premises or to have delivered to her a paid-up policy for as many tenths of the amount of the policy sued upon as she has paid premiums without first having paid defendant the said sum of $793.64, but leaving the same to stand as a lien against the paid-up policy? If so, a decree of specific performance to be awarded against defendant and for costs.

SHARP & BROADHEAD,
Att'ys for Def't.
KRUM & PATRICK,
Att'ys for Pl'ff.

Receipt for premium.

And the receipt annexed to said agreed statement of facts is in the words and figures following, to wit:

BROOKLYN LIFE-INSURANCE COMPANY OF NEW YORK,
No. 141 *Broadway, New York, February 28th,* 1871.

Received from Clinton O. Dutcher six hundred & fifteen $\frac{40}{100}$ dollars, which continues in force policy No. 3718, issued by the company, until

the 29th day of February, 1872, in accordance with the terms and conditions of said policy. (Exhibit A.)

Old note returned herewith, the indebtedness being debited against the policy	$547 48
Amount of premium loaned this year	246 16
Total present indebtedness against policy	$793 64

$369.$^{24}_{100}$.

[Over.] W. M. COLE, *Secretary.*

(Written across the face:) Countersigned, Fassett & Schletter, agent, Febr'y 28th, 1871.

BROOKLYN LIFE-INSURANCE COMPANY OF NEW YORK. OFFICE NO. 141 BROADWAY. NOTICE TO POLICY-HOLDERS.

All premiums are due and payable at the office in New York.
17 For the convenience of the assured, payments may be made to an agent, but only on the production of a receipt for the same, signed by the president or secretary, and such agent shall countersign such receipt as evidence of payment to him.

Premiums must be paid on or before the day when due. No days of grace are allowed, and if the premium be not settled when due, a policy becomes forfeited, and is, by law and by mutual agreement stipulated in the application and the policy, null and void.

In all cases notices will be sent as regularly as possible, but solely as a matter of courtesy. As these often miscarry from a variety of causes, it is absolutely necessary that a policy-holder should make particular note of the dates when his premiums become due, for the company will not be responsible for any omission or miscarriage of notices.

Policy-holders are requested to inform the officers of any change of residence or post-office address.

Premiums remitted by mail must be paid in draft or post-office order, payable to the Brooklyn Life-Insurance Co. No receipt for premiums is valid and binding unless it be signed by either the president or secretary, (and countersigned by an agent, if collected by such.)

And afterwards, to wit, at said last-mentioned regular stated term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in said case on Friday, the 10th day of April, A. D. 1874, to wit:

Case argued and submitted.

CLINTON O. DUTCHER ET AL., PLAINTIFFS, *v.* BROOKLYN LIFE-INSURANCE CO., DEFENDANT. } 37. In chancery.

18 This day come the parties by their respective solicitors, the plaintiffs by William Patrick, esquire, and the defendant by James O. Broadhead, esquire, and this cause coming on to be heard at this term upon the bill, answer, and agreed statement of facts, the same was argued by counsel and submitted; and the court, not being fully advised in the premises, takes further time to consider thereof.

And afterwards, to wit, at a regular stated term of said circuit court, begun and holden at the city of S't Louis, in said district, on Monday,

the twenty-first day of September, A. D. 1874, the following further proceedings were had in said case on Saturday, the 3rd day of October, in said year, to wit:

Judgment.

CLINTON O. DUTCHER ET AL., PLAINTIFFS, *vs.* BROOKLYN LIFE-INSURANCE COMPANY, DEFENDANT. } 37.

This cause came on to be heard at this term upon the agreed statement of facts entered into by the parties; and, having been heretofore argued by counsel and submitted to the court, thereupon, on consideration thereof, it was ordered, adjudged, and decreed as follows, viz: that the said defendant, The Brooklyn Life-Insurance Company of New York, do execute and deliver to the plaintiff, Annie C. Dutcher, a paid-up policy of insurance for the sum of four thousand dollars, dated as of the first day of February, 1872, A. D., assuring the life of Clinton O. Dutcher, of the county of S't Louis, city of S't Louis, and State of Missouri, payable upon his death, with participation in profits, and providing that the defendant shall well and truly pay, or cause to be paid, the
19 said sum of four thousand dollars to the said Annie C. Dutcher; or, in case she shall die before the said Clinton O. Dutcher, shall pay the said sum assured to her heirs, executors, administrators, or assigns within sixty days' due notice and proof of the death of the said Clinton O. Dutcher, and conditioned that the amount of $793.64, bearing interest at the rate of seven per centum, now held by said defendant as a lien against the policy sued upon, be held by the defendant as a lien against said paid-up policy, and that whatever balance there may be due of said sum of $793.64 and the interest thereon, at the time of the death of said Clinton O. Dutcher, less dividends of profits accrued to said paid-up policy at the time of said death, shall be deducted from the amount of said paid-up policy at the time of the death of the said Clinton O. Dutcher and paid to said assured.

Defendant ordered to pay costs.

It is further ordered and adjudged that said defendant pay the costs herein expended, and that an execution be issued therefor.

Appeal prayed for and allowed.

Thereupon said defendant, by its solicitor, prays an appeal to the Supreme Court of the United States from the foregoing decree; which appeal is by the court allowed.

And afterwards, to wit, at said last-mentioned regular stated term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in said case on Saturday the 17th day of October, A. D. 1874, to wit:

Bond of appeal fixed at $1,000.00.

CLINTON O. DUTCHER ET AL., PLAINTIFFS, *vs.* BROOKLYN LIFE-INSURANCE CO., DEFENDANT. } 37. In chancery.

20 On motion of James O. Broadhead, esquire, it is ordered that

the bond of appeal herein be fixed at the sum of one thousand dollars.

And afterwards, to wit, at said last-mentioned regular stated term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in said case on Monday the 26th day of October, A. D. 1874, to wit:

Bond of appeal filed and approved.

CLINTON O. DUTCHER ET AL., PLAINTIFFS,
vs.
BROOKLYN LIFE-INSURANCE CO., DEFENDANT. } 37. In chancery.

This day comes the defendant, by its solicitor, James O. Broadhead, esquire, and presents its bond of appeal herein, with sureties, duly executed as required by law; which bond is approved by the court and ordered to be filed and made a part of the record in this cause.

Bond of appeal.

And said bond, so filed as aforesaid, is in the words and figures following, to wit:

Know all men by these presents that we, The Brooklyn Life-Insurance Company of New York, as principal, and Cha's Hunt and John W. Godfrey, as securities, are held and firmly bound unto Clinton O. Dutcher and Annie C. Dutcher in the full and just sum of one thousand dollars, to be paid to the said Clinton O. Dutcher and Annie C. Dutcher, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 26th day of October, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas, lately, at the September term, A. D. 1874, of the cir-
21, 22 cuit court of the United States for the eastern district of Missouri, in a suit depending in said court between said Clinton O. Dutcher and Annie C. Dutcher, plaintiffs, and said Brooklyn Life-Insurance Company of New York, defendant, a decree was rendered against the said defendant, and the said defendant having appealed from said judgment and decree to the Supreme Court of the United States to reverse the said decree in the aforesaid suit: Now the condition of the above obligation is such that if the said defendant shall prosecute said appeal to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

BROOKLYN LIFE-IN. COMPANY, [SEAL.]
By JOHN W. GODFREY, *Gen'l Manager.*

Sealed and delivered in presence of—
JOHN W. GODFREY. [SEAL.]
CHARLES HUNT. [SEAL.]

Approved by—

SAMUEL TREAT, *Judge.*

Opinion of the court.

And the written opinion of the honorable judges Dillon and Treat is in the words and figures following, to wit:

23 U. S. circuit court, eastern dist. of Missouri. Sept. term, 1874.

CLINTON O. DUTCHER AND ANNIE C., HIS WIFE,
vs.
BROOKLYN LIFE-INS. CO.

Construing the provision of the policy in suit in the light of the practical construction put upon similar policies by the company, held: that the plaintiff was entitled on electing to discontinue the payment of premiums to a paid-up policy without first paying a note held by the company for part premiums, but that said note, with interest, less dividends, was to be deducted from the amount issued when the policy became payable.

Before DILLON & TREAT, *JJ.*

Life-policy. Forfeiture. Payment of premiums. Election to take paid-up policy.

This is a bill in equity against the company to enforce the issue and delivery to the plaintiff of a paid-up policy for $4,000. On Febr'y 29, 1868, the defendant issued its policy to M'r's Dutcher, in which, for the annual premium of $615.40 for ten years, the company insured the life of her husband for $10,000, "with participation in profits." This amount was payable "within 60 days after due notice of proof of death." The other terms of the policy appear in the opinion of the court. After the payment of four annual premiums, the plaintiffs (M'r and M'r's Dutcher) file the present bill, claiming that, under the terms of the policy, they are entitled to a paid-up policy of $4,000. This is resisted by the company. The other necessary facts appear in the opinion of the court.

Krum & Patrick for the plaintiff, Sharp and Broadhead for the company.

24 TREAT, *J.*:

This is a bill filed for specific performance. On the 29th of Feb., 1868, the defendant issued a non-forfeitable policy. The sum insured was $10,000; annual premium, $615.40; number of premiums to be paid, ten; term, natural life of the insured, "with participation in the profits." Payment of the $10,000 was to be made within 60 days after death and proof thereof; the balance of the year's premium, if any, and all indebtedness due or to become due to the company to be first deducted therefrom. This seems to contemplate that there would be, or might be, a part of a year's premium and other indebtedness due at the death of the insured. The policy further provides that, "in case" "the premium as aforesaid" "shall not be paid on or before the day herein mentioned for the payment thereof, or any note or notes which may be given to and received by said company in part payment of any premium, on the day or days when the same shall become due," the policy shall become void.

It further provides that "the dividend of profits which may become payable by virtue of this policy to the holder thereof shall be applied towards the payment of the note taken for part premiums aforesaid, and that if this policy shall become void said holder of the policy shall be liable to pay to said company the amount of all notes taken for premium which shall remain unpaid, except the balance remaining unpaid on the note taken for part premiums and made payable at twelve months from date; and that the said last-mentioned note is to be canceled by said company on the surrender and cancellation of the said policy."

25 There is also a clause absolving the company from liability if the insured becomes an inebriate, "on paying to the holder thereof * * * * * the amount of all unearned premiums actually received thereon up to the time of such payment."

The next and last provision is as follows: "After two annual payments, should the party wish to discontinue, (notice to the company being given before the next premium become due,) the company will issue a paid-up policy for as many tenths of the amount originally assured as there have been annual premiums paid in cash."

In this case the required notice was given after four payments had been made, and a paid-up policy was demanded for the prescribed four-tenths of the amount insured.

The defendant refused the request unless the plaintiffs would first pay their notes for premiums held by the company, contending that the last clause cited above contemplated a previous payment of the annual premiums in cash. The plaintiffs, on the other hand, insist that those notes are mere loans to them, to be paid out of their share of dividends, should their share equal the amount of said notes at the death of the assured, said notes being a lien on the policy for the sum finally due thereon, or, if that be not the true construction of the policy, then the defendant should issue a paid-up policy for $4,000, less the amount of said notes.

The terms of the policy as to notes quoted above are not very clear, for they seem to imply in one phrase that many notes for premiums may be outstanding, and in another phrase that there can be only
26 one outstanding note of the kind, and that for a part of the last premium due.

The course of dealing between the parties, however, has put a practical construction on the contract. The receipt for each annual premium paid (as for the last in this case) is as follows:

"Received from Clinton O. Dutcher $615.40, which continues in force policy No. 3718, issued by this company, until the 29th day of Feb., 1872, in accordance with the terms and conditions of said policy.

Old note returned herewith, the indebtedness being debited against the policy 577 48

Amount of premium loaned this year 246 16

793 6.

The original agreement, it is admitted, was that of the $615.40 for the annual premium $369.24 should be paid in cash and $246.16 in a note at 12 months at 7 per cent. interest. Whereupon a receipt for payment of the whole premium should be given, the amount of said note to be a permanent loan by the company until paid by dividends, and that at the maturity of said note a new note at the same rate of interest should be given, including the $246.16, and the amount of the former note, less the dividend applicable to its payment. This was the mode pursued each year.

It is further admitted in this case that defendant had always, prior to January 20, 1871, issued paid-up policies on demand without deducting the loans or outstanding notes, holding such notes as a lien against the paid-up policy, and that since that date the defendant has uni-
27 formly refused to issue a paid-up policy unless the holder first paid the outstanding loans or notes. As there are many like suits pending against this defendant on somewhat similar policies, issued at different times, it may be well to examine them with reference to any changes made by the company in the terms of its subsequent contracts.

Thus, policy No. 6060, issued March, 1869, is the same as that with reference to which this suit is instituted, except that on the back thereof, in print and writing, the cash surrender-value of the policy is stated for successive years, that value being "exclusive of the value of any dividend, deposits, or reversions, which the company will pay in addition;" also that "the above amounts, less any outstanding loans or notes, will be paid on the surrender of this policy, duly receipted, within two months after being forfeited by non-payment of premiums."

The policies of the defendant were stated from the first to be non-forfeitable, yet they contained clauses of forfeiture. Subsequently, as above, the non-forfeitable provisions were attempted to be defined; that is, a surrender cash value was stated if the policy was surrendered within two month after forfeiture. Still, in the body of the policy the forfeiture clause for non-payment of premium and notes when due was retained.

Policy 5633, issued in January, 1869, omits the words "non-forfeiture policy," and substitutes for the provision above quoted, as the last in the policy No. 3718, (that in question,) these words: "On the surrender of this policy, while in force, after the full amount of two or
28 more annual premiums have been paid, in cash, including the payment of any note or notes given on account of premiums, the company will issue a paid-up policy for the amount of premium paid, less any and all dividends paid on said policy."

On the back of policy (No. 5633) was the same agreement as to cash surrender-value as that endorsed on policy No. 6060.

The company had thus added to the new policies, subsequent to plaintiff's, the requirement of previous payment of notes given on account of premiums, indicating on its part that there was previous uncertainty on that point.

It thus appears that the policies issued by this company at the commencement were designed to induce the holders to understand that they included several distinct provisions favorable to the insured, viz:

1st. They were non-forfeitable. Afterwards they defined, under the head of cash surrender-value, the precise meaning of their non-forfeitable qualities, and limited to two months the condition of non-forfeiture, still retaining on the face of the policy their non-forfeiture designation, and, among the conditions, a forfeiture clause. Such seemingly inconsistent and conflicting provisions exact a construction against the company most favorable to the insured.

2nd. They gave to the insured a participation in the profits. For what period of time? When he was insured for his natural life, would not his participation in the profits continue until his death? It matters not that the annual premiums were to cease at the expiration of ten years if the insurance was for life. The participation in profits may be
29 in various ways, either by corresponding reduction of premiums, in annual cash dividends, or in additions, with or without accumulations of interest, to the principal sum assured.

3rd. The defendant's policies determined the mode of participation in profits when part payment of annual premiums was by note. At the time of the next annual premium, which would be the same time the previous note fell due, there would be credited on the note the dividend of profits to which it was entitled, then the balance, together with the amount payable by note for the next premium, would be included in the new note, and the former note would be canceled. In that way there would be only one note outstanding. Such was the practical construction given and assented to. Yet serious difficulties might have arisen

if a forfeiture had been claimed, for it is provided that the holder, when forfeiture occurs, shall be liable to pay all unpaid notes taken for premiums, "except the balance remaining unpaid on the note taken for part premiums and made payable at twelve months from date," and said last note is to be surrendered and canceled on surrender and cancel'ation of the policy. If that was the only note which could in the routine of business be outstanding and that was to be surrendered and canceled, for what would the holder be liable? It would seem he would lose only the cash paid on the premiums, and that his notes would be surrendered.

But under the clause concerning inebriates, when the company cancels a policy, it must pay back the amount of all unearned premiums actually received. What is meant thereby? Actually received only in cash or both in cash and notes? The main question in dispute
30 here is whether the defendant is bound to issue a paid up policy except when the amount of actual payments are actually paid in cash or the notes given are also first paid in cash. Under the clause concerning inebriates the company must pay back the amount of unearned premiums actually received. How received? In cash merely? Certainly it cannot be fairly contended that the company would absolve itself under that clause by returning the cash payments and holding the assured liable on his notes for premiums.

The payment of premiums includes both cash and notes given. Why then should not the phrase in the last clause as to annual premiums paid in cash receive equally as broad and favorable a construction?

4th. The policies contemplated part payment by note, and indicated how the notes should be treated in connection with the profits, and also how the sum due on said notes should be met when the policy became payable, viz: that the sum insured should be paid, less the amount due on the notes.

5th. If the ten annual payments had been made, the original policy would have stood as a paid-up policy, and the last note would have been outstanding payable in twelve months, by its terms, less dividend accrued. Was it contemplated that it should be paid at the end of said twelve months, when it is admitted that the sum named therein was to be a permanent loan at 7 per cent. debited against the policy? If so, what was the inducement as to part payment by note and as to participation in profits to be applied to the payment of the note? How was the participation of profits to be thereafter enjoyed?

The theory of the plan proposed and acted on was a receipt
31 for the annual premium as for cash, while actually cash was to be paid for part and a note was to be received as a cash payment for the balance.

Throughout the ten years no actual payment even of interest on the notes was expected, but the balance due therein was carried into a new note.

Practically it seems the plan offered to the insured was found not to work satisfactorily to the company, and hence it changed not only the phraseology of its latter policies, but its own interpretation of the earlier policies. It changed the last clause concerning paid-up policies for tenths as to "annual premiums paid in cash," so that it should read, "including the payment of any note or notes, etc."

Through all the various provisions concerning non-forfeiture, cash surrender, issuing of paid-up policies for tenths, the giving of notes, the way these notes should be treated on cash-surrenders, or cancel'ation in case of inebriates, in short, throughout the various contingencies at-

tempted to be provided for, the notes are treated as sums to be accounted for on the final payment of the policies, and not before. It is impossible to reconcile the various provisions with each other, or with the manifest theory on which the earlier policies were based, or with the practical construction given, unless it held that paid-up policies were to be issued for the tenths named, without the previous payment of the notes or the deduction of them from the amount of said tenths. If deducted, what was to become of the participation of profits and what of the interest they bore?

32 The conclusion is that plaintiffs are entitled, on the facts agreed, to their paid-up policy. The company will hold the notes bearing seven per cent. interest, and whatever balance due, less dividends, there may be at the time of the death of the assured will be deducted from the tenths assured.

The defendant agreed that plaintiffs should participate in the profits during the natural life of the assured; that they should give notes for part of annual premiums; that at the expiration of ten annual premiums the policy should be considered paid up; that the dividends should be applied towards payments of the notes; that the amount payable at the death of the assured should be $10,000, less the balance due on the final note given as above stated.

It could not be determined until the death what would be due on that note, for while it bore 7 per cent. interest annually it was subject to reduction for dividends. It was uncertain whether the dividends would exceed the interest or amount to the whole note, principal and interest. Hence, when the paid-up policy for tenths was demanded, the plaintiffs were entitled thereto, without previous payment of the notes.

DILLON, *Circuit Judge:*

The policy here in question is dated February 29, 1868. The payment of the premium was to be made each year part in cash and part in a note for the amount of the premium "loaned by the company to the assured" upon interest. After making four annual payments the assured elected to avail herself of the last provision of the policy, which is in these words: "after two annual payments, should the party

33 wish to discontinue, the company will issue a paid-up policy for as many tenths of the amount originally assured as there have been annual premiums paid in cash." The company holds the note of the assured, given for previous premiums, less dividends for $793.64, drawing 7 per cent. interest.

The assured now demands a paid-up policy for $4,000, which the company refuses to issue unless she will first pay in cash her note for $793.64, held by the company. The assured concedes, if the company issues the policy for $4,000, that her outstanding note for $793.64, with interest to the death of the person whose life is assured, less dividends, is by the terms of the policy then to be deducted from the $10,000. As shown by my brother Treat, the provisions of the policy bearing upon the question now to be decided are far from being harmonious or clear.

Under these circumstances it seems to me that we cannot go far wrong if we hold the company, in this case, to the same measure of liability that down to January 20, 1871, it voluntarily admitted.

It is peculiarly a case, as it seems to me, in which the practical construction put upon the *the* same kind of contract by the company for years should be adopted by the court.

Among the agreed statement of facts is the following: "That from the

time the defendant began business to the 20th day of January, 1871, it was the course of business of the defendant to issue paid-up policies to policy-holders on demand, without deducting the loans of the defendant to the policy-holder, and to hold the same as a lien against the
34 paid-up policy; but on and after said date the defendant refused to give a paid-up policy to any policy-holder without the payment first of any loans due defendant by such policy-holder."

I give to this course of dealing a controlling influence in my judgment, and, accordingly, am of opinion that the plaintiffs are entitled, on the agreed facts, to a paid-up policy for $4,000, payable at the time and on the terms specified in the present policy as here expounded.

Decree accordingly.

35 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Austin Drake, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 37, of Clinton O. Dutcher et al., plaintiffs, against The Brooklyn Life-Insurance Company, defendant, as fully as the same remains on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St Louis, in said district, this twelfth day of December, in the year of our Lord eighteen hundred and seventy-four.

[SEAL.]

AUSTIN DRAKE,
Clerk of said Court,
By H. C. GEISBERG, *Deputy.*

(Indorsed:) No. 37. United States circuit court, eastern district of Missouri. Clinton O. Dutcher et al., plaintiffs, against The Brooklyn Life-Insurance Company, defendant. Duly-certified transcript of the record and proceedings in the above-entitled cause.

(Indorsement on cover:) No. 57. The Brooklyn Life-Insurance Company of New York, appellant, vs. Clinton O. Dutcher and Annie C. Dutcher. E. Missouri C. C. U. S. Filed 17th March, 1875.

9

IN THE

Supreme Court of the United States.

THE BROOKLYN LIFE INSURANCE COMPANY OF NEW YORK, APPELLANT,

vs.

C. O. DUTCHER AND ANNIE C. DUTCHER.

Statement and Brief of James O. Broadhead, for Appellant.

STATEMENT.

This is a bill in equity for specific performance, to enforce the issue and delivery to respondents, Clinton O. Dutcher and Annie C. Dutcher, of a paid-up policy of insurance of $4,000.

The facts are that, on the 29th of February, A. D. 1868, the appellant issued its policy to Annie C. Dutcher, by which, for the annual premium of $615.40 for ten years, the company insured the life of her husband for $10,000, which amount was payable in sixty days after due notice and proof of death.

After the payment of four annual premiums, partly in cash and partly by giving notes to the company, one of which was held by the company at the time the plaintiffs filed their bill, claiming that, under the terms of the policy, they were entitled to a paid-up policy for the sum of $4,000.

The clause of the policy relied on is as follows:

"After two annual payments, should the party wish to discontinue, (notice having been given before the next premium becomes due,) the company will issue a paid-up policy

for as many tenths of the amount originally insured as there have been annual premiums paid in cash."

The complainants in this bill averred that they had paid up the whole amount of their annual premiums for four years, due according to the terms of the contract of insurance.

The defendant, in its answer, denies that these several annual premiums have been paid by the plaintiffs, but says that the plaintiffs have paid part of their premiums in cash each year, and given their notes for the balance, which, with interest, yet remain unpaid; and defendant further says that, upon the payment of these notes and the surrender of the policy, it will issue a paid-up policy for $4,000, as required, but that the money has not been paid, nor have the plaintiffs offered to surrender the policy originally issued.

The policy is set out in full on the 4th page of the record; and the agreed statement of facts upon which the case was decided is found at page 8 of the printed record.

Upon this statement of facts, the court decreed that the company should issue a paid-up policy for $4,000; and, from that decree, this case is appealed.

Error.

The error assigned is, that the court misconstrued the provisions of the policy, which declares, that "after two annual payments, should the party wish to discontinue, (notice to the company being given before the next premium becomes due,) the company will issue a paid-up policy for as many tenths of the amount originally assured as there have been annual premiums paid *in cash*," in holding that the payment of part in money, and the giving of a note for the balance of the premium, was a payment of the whole premium *in cash*.

Argument.

The court below was in doubt as to whether its decision was right or not. Judge Dillon says, "the provisions of the policy are far from being harmonious or clear." This want

of harmony and clearness in the provisions of the policy, with all due deference, seems to be rather imaginary than real, and is produced by an attempt to make other provisions of the policy have a bearing upon the interpretation of the clause in controversy, when there is no occasion for it. They can have no purpose except to make obscure what is perfectly plain when taken by itself.

Certainly there can be no misunderstanding about the meaning of the words:

"After two annual payments, should the party wish to discontinue, the company will issue a paid-up policy for as many tenths of the amount originally insured as there have been annual premiums *paid in cash.*"

A *cash* payment is a payment in money, all the world over; strictly and legally speaking, there could be no *payment* except a payment in money, although there might be accord or satisfaction; but to put the matter beyond controversy, and using language well understood and in ordinary use, the words "*paid in cash*" are used.

Moreover, these words are peculiarly significant, in view of the fact that the policy itself refers to a different kind of payment in the following clause: "or in case the said Annie C. Dutcher shall not pay, or cause to be paid, the premium as aforesaid on or before the day herein mentioned for the payment thereof, or *any note* or notes which may be given to and received by said company in *part payment* of *any premium* on the day or days when the same shall become due." Here it appears that a part payment of a premium may be *made by note*, and this appears from the testimony in the agreed statement of facts to have been the mode of settling the premiums from year to year, a mode clearly contemplated by the policy itself. It is very evident, therefore, that the words, "*paid in cash*," were intended to refer to a different kind of payment than a payment by note. A plainer or more logical proposition could hardly be conceived of. But the court below argues, in the teeth of this plain proposition, that because the party was insured with "*participation in profits*," that

the only way to secure those profits is to leave a note outstanding during the whole life of the policy, whether it be a commuted policy or not, so that the profits in the way of dividends may from time to time be credited on the note; but the court (Judge Treat) admits in his opinion (p. 15 of the Record) that the participation in profits may be in various ways, either by corresponding reduction of premiums, in annual cash dividends, or in additions, with or without interest, to the principal sum assured."

It is true that there is a provision in this policy "that the dividend of profits, which may become payable by virtue of this policy to the holder thereof, shall be applied towards the payment of the note taken for part premiums aforesaid, and that if this policy shall cease, or become null or void, said holder of the policy shall be liable to pay to said company the amount of all notes taken for the premium which shall remain unpaid, except the balance remaining unpaid on the note taken for part premiums, and made payable at twelve months from date, and that the said last-mentioned note is to be canceled by the said company, on the surrender and cancellation of the said policy;" but this clause of the policy is not difficult of construction. It means, and can only mean, that as long as the policy is in force and uncanceled, the dividends of profits shall be credited on the note or notes given for part premium, and that, upon *surrender* or *cancellation* of the policy, the assured shall be required to pay all notes given for part premiums, except the note given for portion of the last year's premium, not paid in cash.

It appears from the agreed statement of facts, that the amount of the note given each year was the sum of $246.16, subject to a deduction, at the end of the year, to the amount of the dividends for that year. This might be a separate note for each year, or the amounts due on the note made payable at the end of each year might be added to the amount for which a note was to be given at the end of each subsequent year, and all put into one note, as was done in this case. So that the whole amount due by note at the end of the four years, less the dividends, was the sum of $793.64, including

the amount due for the last year, which was $246.16. But this provision only applies to the case of a surrender or cancellation of the policy, and not to the case of a commuted policy. In the latter case, the assured is required to pay in cash all premiums due or earned up to the time of the commutation of the policy.

In case the assured shall become an inebriate, the company has the right to declare the policy canceled, and shall be absolved from all liability under it, upon the return and payment to the assured of all unearned premiums *actually received* up to the time of payment. That means, of course, actually received, either in cash or by the giving of a note. It does not say actually received in cash—the premium is paid in advance, part in cash and part by note—the company receives both the cash and the note, payable at twelve months, which makes the insurance good for one year; but if canceled for the cause last above mentioned at the end of six months, the company delivers up the note, and so much of the cash as with the note would make one half the premium, because only one half the premium would have been earned. But the assured can, only on his own motion, and by his own request, after giving notice before the next premium falls due, get a *commuted* or *paid-up* policy, by paying in cash the amount of the annual premiums which have actually accrued up to the time when the application is made. The language is plain and unambiguous, and the clause is susceptible of but one construction. The premiums must be *paid in cash*, and this cannot be a cash payment by giving a note, or anything else but cash.

This case presents simply the construction of the last clause of the policy. There are no authorities bearing upon the point, and we think that the clause can bear but one construction, and that the assured is not entitled to a paid up policy until the amount of the premium due at the time is paid in cash to the company. The company has the right to waive it and hold the note, as it had chosen to do in several instances before, but it has also the right to insist upon the plain terms of the contract; and if anything should accrue to the assured, by way of dividends for profits, it may be either paid from

year to year to the assured, or added to the amount for which the policy is issued. The party is insured in the sum of $10,000, with participation in profits, but there is nothing in the policy which shows how those profits are to be paid, except as a credit on the premium note, as long as the policy is not *surrendered* or *canceled*. When it is surrendered or canceled, then the whole matter is to be squared up and settled, as provided in the policy; but if the party wishes a commuted or paid-up policy, then he must pay all premiums up to that date in cash.

JAS. O. BROADHEAD,
For Appellant.